United Nations PCNICC/2001/L.3/Rev.1

Preparatory Commission for the International Criminal Court

Distr.: Limited
11 October 2001

Original: English

New York
26 February-9 March 2001
24 September-5 October 2001

Proceedings of the Preparatory Commission at its eighth session (24 September-5 October 2001)

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Summary

Rapporteur: Mr. Salah **Suheimat** (Jordan)

1. The Preparatory Commission for the International Criminal Court, established in accordance with resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, met at United Nations Headquarters from 24 September to 5 October 2001, in accordance with General Assembly resolution 55/155 of 12 December 2000.

2. In accordance with paragraph 2 of resolution F of the Conference, the Preparatory Commission consists of representatives of States which signed the Final Act of the Conference and other States which were invited to participate in the Conference.

3. Under paragraph 4 of General Assembly resolution 55/155, the Secretary-General was requested to reconvene the Preparatory Commission, in accordance with resolution F of the Conference, from 26 February to 9 March and from 24 September to 5 October 2001, so as to continue to carry out the mandate of that resolution and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court.

4. In accordance with paragraph 6 of General Assembly resolution 55/155, the Secretary-General invited, as observers to the Preparatory Commission, representatives of organizations and other entities that have received a standing invitation from the General Assembly, pursuant to its relevant resolutions, to participate in the capacity of observers in its sessions and work, and also invited as observers to the Commission representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

5. Under paragraph 7 of the same resolution, non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure of the Commission, receiving copies of the official documents and making available their materials to delegates.

6. The Bureau of the Preparatory Commission, which was elected at its 1st and 2nd meetings, on 16 and 22 February 1999, continued its work, with the following composition:

Chairman:
Philippe Kirsch (Canada)

Vice-Chairmen:
George Winston McKenzie (Trinidad and Tobago)
Medard R. Rwelamira (South Africa)
[...]

Rapporteur:
Salah Suheimat (Jordan)

7. At its 30th plenary meeting, on 24 September 2001, the Preparatory Commission was informed that Muhamed Sacirbey (Bosnia and Herzegovina) was no longer available to act as Vice-Chairman of the Commission.

8. The Director of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, Václav Mikulka, acted as Secretary of the Preparatory Commission. The Codification Division provided the substantive servicing for the Commission.

9. At its eighth session, the Preparatory Commission proceeded with its work on the basis of its agenda (PCNICC/1999/L.1), which had been adopted on 16 February 1999.

10. In accordance with the decision taken at its 29th meeting, on 9 March 2001, the Preparatory Commission agreed on a work plan for its eighth session, which provided for the consideration of seven items: the Relationship Agreement between the Court and the United Nations; the Financial Regulations and Rules of the Court; the Agreement on the Privileges and Immunities of the Court; the Rules of Procedure of the Assembly of States Parties; the crime of aggression; the basic principles of the headquarters agreement to be negotiated between the Court and the host country; and the first-year budget. At the same meeting, the Preparatory Commission also decided to establish working groups on the last two items.

11. The coordinators for the first five items, who had been designated by the Chairman, in consultation with the Bureau, at the sixth and seventh sessions of the Preparatory Commission, continued their work during the eighth session, as follows:

(a) Cristian Maquieira (Chile), Coordinator for the Relationship Agreement between the Court and the United Nations;

(b) Georg Witschel (Germany), Coordinator for the Financial Regulations and Rules of the Court;

(c) Phakiso Mochochoko (Lesotho), Coordinator for the Agreement on the Privileges and Immunities of the Court;

(d) Saeid Mirzaee-Yengejeh (Islamic Republic of Iran), Coordinator for the Rules of Procedure of the Assembly of States Parties;

(e) Silvia Fernández de Gurmendi (Argentina), Coordinator for the crime of aggression.

12. At the 30th meeting of the Preparatory Commission, on 24 September 2001, the Chairman, following consultations with the Bureau, designated Zsolt Hetesy (Hungary) as Coordinator of the Working Group on the Principles Governing a Headquarters Agreement and Rolf Fife (Norway) as the Coordinator of the Working Group on the First Year Budget.

13. At its 33rd meeting, on 5 October 2001, the Preparatory Commission adopted its report on its sixth to eighth sessions, containing the draft texts of the Relationship Agreement between the Court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court, and the Rules of Procedure of the Assembly of States Parties (see PCNICC/2001/1 and Add.1-4).

14. At the same meeting, the Preparatory Commission took note of the oral reports of the coordinators of the working groups on the Principles Governing a Headquarters Agreement, the First-Year Budget and the Crime of Aggression. For ease of reference of delegations, the Commission requested the Secretariat to prepare a document on the basis of the oral reports of the coordinators and to annex it to the proceedings of the eighth session.

15. At the same meeting, the Preparatory Commission also took note of the following with respect to the Working Group on Financial Regulations and Rules of the Court:

- The Working Group decided to focus on the Financial Regulations and that the Financial Rules should be considered at a later stage;
- The question of a contingency mechanism to meet extraordinary expenses was extensively discussed and the Working Group was of the view that the matter required further reflection and discussion in the future.

16. At the 32nd meeting, on 1 October 2001, Zsolt Hetesy, focal point for general issues, introduced a road map (PCNICC/2001/L.2 and Corr.1), which had been prepared by the Bureau, to identify the issues that remained to be addressed by the Preparatory Commission in order to facilitate the speedy and effective establishment of the Court.

17. At its 33rd meeting, on 5 October 2001, the Preparatory Commission noted that at its ninth session, to be held in 2002, in addition to the working groups on the First-Year Budget, Principles Governing a Headquarters Agreement and the Crime of Aggression, there would be the following two additional working groups: the Working Group on Assembly of States Parties Preparatory Documents and the Working Group on Financial Issues. The Chairman, following consultations with the Bureau, designated Saied Mirzaiee-Yengejeh (Islamic Republic of Iran) as Coordinator for Assembly of States Parties preparatory documents and Rolf Fife (Norway) as Coordinator for financial issues.

18. At the same meeting, the Chairman, following consultations with the Bureau, appointed three focal points for three areas that were identified in the road map as in need of provisional internal rules and regulations: Phakiso Mochochoko (Lesotho), focal point for human resources and administration; Christian Much (Germany), focal point for budgetary and finance issues; and Sivu Maqungo (South Africa), focal point for operational issues.

19. At the same meeting, the Chairman, following consultations with the Bureau, established a subcommittee of the Bureau to act as interlocutor between the Preparatory Commission and the host Government to deal with the management of practical issues regarding the establishment of the Court. The subcommittee has the following composition: Chair: Silvia Fernandez de Gurmendi (Argentina); members: Andras Vamos-Goldman (Canada), Zsolt Hetsey (Hungary) and Patricio Ruedas (Spain).

20. At the 31st meeting, on 25 September 2001, His Excellency Jozias J. van Aartsen, Minister for Foreign Affairs of the Netherlands, made a statement (PCNICC/2001/INF/3) to the Commission on the preparatory work that the Government of the Netherlands was undertaking for the establishment of the Court. The Commission took note of the statement.

21. At its 32nd meeting, on 1 October 2001, the Preparatory Commission was addressed by Adama Dieng, Registrar of the International Criminal Tribunal for Rwanda, and Hans Holthuis, Registrar of the International Tribunal for the Former Yugoslavia.

22. The Preparatory Commission noted with satisfaction that during its eighth session, 19 delegates had made use of the trust fund which, pursuant to paragraph 8 of General Assembly resolution 53/105 of 8 December 1998, had been established to facilitate the participation of the least developed countries in the work of the Commission. The International Human Rights Law Institute of DePaul University (United States of America) provided accommodation to delegates from the least developed countries who attended the session.

23. The list of documents relating to the items considered at the eighth session and remaining on the work plan of the Commission is contained in annex I to the present document.

Annex I

List of documents*

[Original: Arabic/English/French/Spanish]

General documents

Symbol	*Description*
PCNICC/1999/INF/3	Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998 — Note by the Secretariat
PCNICC/2000/1	Report of the Preparatory Commission for the International Criminal Court
PCNICC/2000/1/Add.1	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part I — Finalized draft text of the Rules of Procedure and Evidence
PCNICC/2000/1/Add.2	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part II — Finalized draft text of the Elements of Crimes
PCNICC/2000/INF/4	Statements made in plenary in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crimes
PCNICC/2001/1	Report of the Preparatory Commission for the International Criminal Court (continued)
PCNICC/2001/1/Add.1	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part I — draft Relationship Agreement between the Court and the United Nations
PCNICC/2001/1/Add.2	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part II — draft Financial Regulations
PCNICC/2001/1/Add.3	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part III — draft Agreement on the Privileges and Immunities of the Court
PCNICC/2001/1/Add.4	Report of the Preparatory Commission for the International Criminal Court — Addendum: Part IV — draft Rules of Procedure of the Assembly of States Parties

* General documents, documents issued at the sixth to eighth sessions of the Preparatory Commission, documents of the Working Group on the Basic Principles of the Headquarters Agreement to be Negotiated between the Court and the Host Country and of the Working Group on a Draft Budget for the First Financial Year of the Court, as well as documents relating to the crime of aggression issued at the first to eighth sessions. For the list of documents relating to the draft Relationship Agreement between the Court and the United Nations, the draft Financial Regulations, the draft Agreement on the Privileges and Immunities of the Court and the draft Rules of Procedure of the Assembly of States Parties, issued at the sixth to eighth sessions of the Preparatory Commission, held in 2000 and 2001, see document PCNICC/2001/1, annex I.

Sixth session of the Preparatory Commission (27 November-8 December 2000)

Symbol	*Description*
PCNICC/2000/L.4	Proceedings of the Preparatory Commission at its sixth session (27 November-8 December 2000) (draft summary)
PCNICC/2000/L.4/Rev.1	Proceedings of the Preparatory Commission at its sixth session (27 November-8 December 2000) (summary)
PCNICC/2000/DP.1	Proposal submitted by the United States of America — further issue for consideration by the Preparatory Commission
PCNICC/2000/INF/5	List of delegations

Seventh session of the Preparatory Commission (26 February-9 March 2001)

Symbol	*Description*
PCNICC/2001/L.1	Proceedings of the Preparatory Commission at its seventh session (26 February-9 March 2001) (draft summary)
PCNICC/2001/L.1/Rev.1	Proceedings of the Preparatory Commission at its seventh session (26 February-9 March 2001) (summary)
PCNICC/2000/INF/5/Corr.1	List of delegations (sixth session) — corrigendum
PCNICC/2001/INF/1	Information document submitted by Cameroon
PCNICC/2001/INF/2	List of delegations (seventh session)

Eighth session of the Preparatory Commission (24 September-5 October 2001)

Symbol	*Description*
PCNICC/2001/L.2	Road map leading to the early establishment of the International Criminal Court
PCNICC/2001/L.2/Corr.1	Corrigendum
PCNICC/2001/L.3	Proceedings of the Preparatory Commission at its eighth session (draft summary)
PCNICC/2001/L.3/Rev.1	Proceedings of the Preparatory Commission at its eighth session
PCNICC/2001/L.3/Rev.1/Add.1	Annex II — draft first-year budget
PCNICC/2001/DP.1	Comments by Turkey with regard to the terrorist crimes
PCNICC/2001/DP.2	Views of Estonia on the International Criminal Court

Symbol	*Description*
PCNICC/2001/INF/3	Statement by the Minister for Foreign Affairs of the Kingdom of the Netherlands, Jozias J. van Aartsen, presented during the eighth session of the Preparatory Commission on 25 September 2001
PCNICC/2001/INF/4	List of delegations (eighth session)

Working Group on the Basic Principles Governing a Headquarters Agreement to be Negotiated between the Court and the Host Country

Eighth session of the Preparatory Commission (24 September-5 October 2001)[1]

Symbol	*Description*
PCNICC/2001/WGHQA/L.1	Basic principles governing an agreement to be negotiated between the International Criminal Court and the Kingdom of the Netherlands regarding the headquarters of the Court (prepared by the Secretariat)

Working Group on a Draft Budget for the First Financial Year of the Court

Eighth session of the Preparatory Commission (24 September-5 October 2001)[2]

Symbol	*Description*
PCNICC/2001/WGFYB/L.1	Draft budget for the first financial year of the Court: prepared by the Secretariat
PCNICC/2001/WGFYB/L.1/Corr.1	Corrigendum
PCNICC/2001/WGFYB/RT.1	Part One — Proposed structure and administrative arrangements
PCNICC/2001/WGFYB/RT.1/Add.1	Addendum — Priority guidelines for the preparation of a revised draft first-year budget of the International Criminal Court

[1] No documents were issued under this heading during the first to seventh sessions of the Preparatory Commission.

[2] No documents were issued under this heading during the first to seventh sessions of the Preparatory Commission.

The crime of aggression

General documents relating to the crime of aggression

First session of the Preparatory Commission (16-26 February 1999)

Symbol	*Description*
PCNICC/1999/DP.11	Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen on the crime of aggression

Second session of the Preparatory Commission (26 July-13 August 1999)

Symbol	*Description*
PCNICC/1999/DP.12	Proposal submitted by the Russian Federation: definition of the crime of aggression
PCNICC/1999/DP.13	Proposal submitted by Germany: definition of the crime of aggression
PCNICC/1999/INF/2	Compilation of proposals on the crime of aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999)
PCNICC/1999/INF/2/Add.1	Addendum

Third session of the Preparatory Commission (29 November-17 December 1999)

Symbol	*Description*
PCNICC/1999/L.5/Rev.1	Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999) (summary), annex IV

Fourth session of the Preparatory Commission (13-31 March 2000)

Symbol	*Description*
PCNICC/2000/L.1/Rev.1	Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000) (summary), annex IV

Fifth session of the Preparatory Commission (12-30 June 2000)

Symbol	*Description*
PCNICC/2000/L.3/Rev.1	Proceedings of the Preparatory Commission at its fifth session (summary), annex II

Sixth session of the Preparatory Commission (27 November-8 December 2000)

Symbol	*Description*
PCNICC/2000/L.4/Rev.1	Proceedings of the Preparatory Commission at its sixth session (27 November-8 December 2000) (summary), annex V

Seventh session of the Preparatory Commission (26 February-9 March 2001)

Symbol	*Description*
PCNICC/2001/L.1/Rev.1	Proceedings of the Preparatory Commission at its seventh session (26 February–9 March 2001) (summary), annex V

Eighth session of the Preparatory Commission (24 September-5 October 2001)

Symbol	*Description*
PCNICC/2001/L.3/Rev.1	Proceedings of the Preparatory Commission at its eighth session (24 September-5 October 2001) (summary), annex III

Working Group on the Crime of Aggression[3]

Third session of the Preparatory Commission (29 November-17 December 1999)

Symbol	*Description*
PCNICC/1999/WGCA/DP.1	Proposal submitted by Greece and Portugal
PCNICC/1999/WGCA/RT.1	Discussion paper proposed by the Coordinator: consolidated text of proposals on the crime of aggression
PCNICC/1999/WGCA/RT.1/Corr.1	Corrigendum
PCNICC/1999/WGCA/RT.1/Corr.2	Corrigendum (French only)

[3] No documents were issued under this heading during the first and second sessions of the Preparatory Commission.

Fourth session of the Preparatory Commission (13-31 March 2000)

Symbol	*Description*
PCNICC/2000/WGCA/DP.1	Proposal submitted by Colombia on the definition of the crime of aggression and on conditions for the exercise of the jurisdiction of the Court with regard to this crime
PCNICC/2000/WGCA/DP.1/Add.1	Addendum
PCNICC/2000/WGCA/DP.2	Proposal submitted by Colombia on the Italian proposal made orally in the Working Group on 13 March 2000
PCNICC/2000/WGCA/DP.3	Suggestions made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression
PCNICC/2000/WGCA/RT.1	Discussion paper proposed by the Coordinator: preliminary list of possible issues relating to the crime of aggression

Fifth session of the Preparatory Commission (12-30 June 2000)

Symbol	*Description*
PCNICC/2000/WGCA/INF/1	Reference document on the crime of aggression, prepared by the Secretariat

Sixth session of the Preparatory Commission (27 November-8 December 2000)

Symbol	*Description*
PCNICC/2000/WGCA/DP.4	Proposal submitted by Germany: the crime of aggression — a further informal discussion paper
PCNICC/2000/WGCA/DP.5	Proposal submitted by Greece and Portugal

Seventh session of the Preparatory Commission (26 February-9 March 2001)

Symbol	*Description*
PCNICC/2001/WGCA/DP.1	Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania

Eighth session of the Preparatory Commission (24 September-5 October 2001)

Symbol	*Description*
PCNICC/2001/WGCA/DP.2	Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania: definition of the crime of aggression
PCNICC/2001/WGCA/DP.2/Add.1	Addendum — Conditions for exercise of jurisdiction over the crime of aggression
PCNICC/2001/WGCA/DP.3	Proposal submitted by Guatemala on document PCNICC/2001/WGCA/DP.2

Annex III

Crime of aggression

[Original: English]

Prepared on the basis of the discussion papers proposed by the Coordinator[1]

A. Consolidated text of proposals on the crime of aggression

Definition of the crime of aggression

Option 1

1. For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.] any of the following acts committed by [an individual] [a person] who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence].

Variation 2

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

[1] The consolidated text of proposals on the crime of aggression (section A of this annex) was issued at the third session of the Preparatory Commission and the preliminary list of possible issues relating to the crime of aggression (section B of this annex) was issued at the fourth session.

Variation 3

Add the following paragraph to paragraph 1, variation 1, above:

2. Provided that the acts concerned or their consequences are of sufficient gravity, [acts constituting aggression include] [the use of the armed force includes] [are] the following [whether preceded by a declaration of war or not]:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade [of the ports or coasts] of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. When an attack [the use of armed force] under paragraph 1 has been committed, the

(a) planning

(b) preparing, or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.

Option 2

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Conditions for the exercise of jurisdiction

Option 1

1. The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of article 13 of the Statute.

2. The Security Council shall determine the existence of an act of aggression perpetrated by the State whose national is concerned in accordance with the relevant provisions of the Charter of the United Nations before proceedings take place in the Court with regard to the crime of aggression.

3. The Security Council, acting in accordance with article 13 (b) of the Statute of the International Criminal Court, shall first make a decision establishing that an act of aggression has been committed by the State whose national is concerned.

4. The Court, upon receipt of a complaint relating to the crime of aggression under article 13 (a) or (c), shall, with due regard to the provisions of Chapter VII of the Charter of the United Nations, first request the Security Council to determine whether or not an act of aggression has been committed by the State whose national is concerned.

5. The Security Council shall make a decision upon this request within [6] [12] months.

6. Notification of this decision shall be made by letter from the President of the Security Council to the President of the International Criminal Court without delay.

Variation 1

7. In the absence of a decision of the Security Council within the time frame referred to in paragraph 5 above, the Court may proceed.

8. The decision of the Security Council under paragraph 5 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Variation 2

7. Notwithstanding the provisions of paragraph 2 above, in the absence of a decision by the Security Council within the time frame referred to in paragraph 5 above, the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation.

8. The General Assembly shall make such a recommendation within [12] months.

9. Notification of this recommendation shall be made by letter from the President of the General Assembly to the President of the International Criminal Court without delay.

10. In the absence of such a recommendation within the time frame referred to in paragraph 8 above, the Court may proceed.

11. The decision of the Security Council under paragraph 5 above or the recommendation of the General Assembly under paragraph 8 above shall not be

interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Option 2

1. The Court shall exercise its jurisdiction with regard to the crime of aggression subject to a determination by the Security Council, in accordance with article 39 of the Charter, that an act of aggression has been committed by the State concerned.

2. When a complaint related to the crime of aggression has been lodged, the Court shall first seek to discover whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned, and if not, it will request, subject to the provisions of the Statute, the Security Council to proceed to such a determination.

3. If the Security Council does not make such a determination or does not make use of article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question.

Option 3[2]

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Explanatory note

A. On the definition of the crime of aggression

(i) The previous text represents an attempt to consolidate, to the extent possible, the proposals already made on the question of definition of the crime of aggression for the purpose of the Rome Statute.

(ii) The text accepts two basic principles, which seem to enjoy widespread support: the principle under which the crime of aggression is committed by political or military leaders of a State; and the principle that the planning, preparation or ordering of aggression should be criminalized only when an act of aggression takes place.

(iii) Option 1 presents three variations after the first sentence in paragraph 1. These variations correspond to most of the various approaches that were suggested with regard to the definition: general definition, definition based on the object or result of occupying or annexing the territory of the attacked State or part thereof, general definition plus detailed list of acts taken from General Assembly resolution 3314 (XXIX) of 14 December 1974.

(iv) Option 2 covers both the definition and the relationship with the Security Council, and is based, in its definitional part, on article 6 (a) of the Charter of the International Military Tribunal of Nürnberg.

[2] Option 3 is duplicated and appears also under the definition of the crime of aggression since it covers the two issues, namely, the definition of the crime and conditions for the exercise of jurisdiction.

(v) On some points, square brackets appeared to be inevitable to show the different formulas that were suggested. Where part of the text is added in square brackets, this is not intended to indicate lesser support for that part.

B. On the conditions for the exercise of jurisdiction

(i) The text is an attempt to consolidate all the proposals circulated so far on this issue, taking also into account views expressed by delegations from the floor.

(ii) Option 1 is an attempt to reflect views seeking to reconcile the prerogatives of the Security Council with the independence of the Court.

Hence, it is founded on the following considerations:

- Article 5 (2) of the Statute of the International Criminal Court stipulates that the definition of the *crime of aggression* and the conditions under which the Court shall exercise jurisdiction with respect to this crime shall be consistent with the relevant provisions of the Charter of the United Nations;
- As set out in Article 39 of the Charter, the Security Council has the responsibility for establishing the existence of an *act of aggression*;
- The Court exercises its jurisdiction over persons on the *crime of aggression* (articles 1, 5 and 25 of the Statute);
- The *crime of aggression* presupposes the existence of an *act of aggression*;
- The trigger mechanism should therefore recognize the primary responsibility of the Security Council to establish the existence of an *act of aggression* in accordance with the relevant provisions of the Charter;
- Variation 2 is based on the assumption that if, for any reason, the Security Council cannot make a decision, the Charter itself provides for an internal mechanism to address the issue.

(iii) Option 3 embodies both the definition and the relationship between the Court and the Security Council, and is based in its conditional part on the proposal as contained in article 23 (2) of the International Law Commission draft statute for the International Criminal Court.

B. Preliminary list of possible issues relating to the crime of aggression

Discussion paper proposed by the Coordinator

A possible checklist of issues to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute and resolution F, paragraph 7, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

N.B. This preliminary list of possible issues is based on an initial review of the Rome Statute with a view to determining the provisions that may in some way be related to the definition of the crime of aggression. This non-exhaustive list is intended to facilitate a thematic discussion of possible issues most of which are closely interrelated.

I. Possible issues relating to the Rome Statute

- **Definition**

  (i) Whether the definition should be more general in nature referring to what may be the essential characteristics of the crime of aggression. (Possible instruments of reference: Charter of the United Nations; Nürnberg Charter; Draft Code of Crimes against the Peace and Security of Mankind; case law and other documents)

  (ii) Whether the definition should include a more specific list of acts which could constitute the crime of aggression. (Possible instrument of reference: General Assembly resolution 3314 (XXIX))

  (iii) Whether it would be possible to identify some acts listed in resolution 3314 (XXIX) and add them to the general definition of the crime of aggression.

- **Conditions under which the Court shall exercise jurisdiction**

  (i) What role should be played by the Security Council in relation to the jurisdiction of the Court over the crime of aggression?

  (ii) What action, if any, could be taken in the event that the Security Council fails or otherwise declines to determine that an act of aggression has occurred?

  (iii) What are the legal effects on the functions of the Court arising from a determination by the Security Council that an act of aggression was committed by a State?

- **Consistency with the relevant provisions of the Charter of the United Nations**

- **Complementarity and admissibility**

  How would the provisions of the Statute on complementarity (admissibility, challenges to the Court's jurisdiction) be applicable to the crime of aggression?

(This could include issues dealt with in preambular paragraphs 6 and 10, article 1, as well as articles 12 to 19 of the Rome Statute.)

- ***Ne bis in idem***

Applicability of exceptions to the crime of aggression (Rome Statute, art. 20 (3), only refers to crimes in arts. 6, 7 and 8)

- **General principles of criminal law**

Consider the relationship between the definition of the crime of aggression and the articles on general principles of criminal law:

(i) *Nullum crimen sine lege* (art. 22)

(ii) *Nulla poena sine lege* (art. 23)

(iii) Non-retroactivity *ratione personae* (art. 24)

(iv) Individual criminal responsibility (art. 25)

(v) Exclusion of jurisdiction over persons under eighteen (art. 26)

(vi) Irrelevance of official capacity (art. 27)

(vii) Responsibility of commanders and other superiors (art. 28)

(viii) Non-applicability of statute of limitations (art. 29)

(ix) Mental element (art. 30)

(x) Grounds for excluding criminal responsibility (art. 31)

(xi) Mistake of fact or mistake of law (art. 32)

(xii) Superior orders and prescription of law (art. 33)

- **Investigation and prosecution**

Consider the provisions concerning the investigation and prosecution of crimes with respect to the crime of aggression (e.g., initiation of an investigation (art. 53))

- **National security information**

Consider the provisions concerning the protection of national security information in relation to the crime of aggression (art. 57 (3) (c), art. 72, art. 93 (4) and art. 99 (5))

- **International cooperation and judicial assistance**

These provisions may require further consideration depending upon the applicability of the principle of complementarity to the crime of aggression.

The following parts of the Rome Statute do not appear to raise possible issues regarding the definition of the crime of aggression:

Part 4. Composition and Administration of the Court

Part 7. Penalties (The penalties set forth in article 77 are applicable to all crimes referred to in article 5.)

Part 8. Appeal and Revision

Part 10. Enforcement

Part 11. Assembly of States Parties

Part 12. Financing

Part 13. Final Clauses (The provision on aggression is to be adopted in accordance with articles 121 and 123 pursuant to article 5 of the Rome Statute.)

II. Possible issues relating to the Elements of Crimes

- The elements of the crime of aggression are provided for in resolution F rather than article 9 of the Rome Statute.
- Consider the structure and general provisions of the elements of the other crimes prepared pursuant to article 9 of the Rome Statute to ensure consistency.

III. Possible issues relating to the Rules of Procedure and Evidence

- Review the final text of the Rules of Procedure and Evidence prepared by the Preparatory Commission to determine whether there are provisions that require consideration in relation to the definition of the crime of aggression.

IV. Other possible issues

- What are the legal effects on the ICC of a decision of the International Court of Justice concerning aggression?